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Supreme Court, U.S.
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No. 90-1231

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PAUL CASPARI, *Superintendent, Missouri Eastern Correctional Center,* and WILLIAM L. WEBSTER, *Attorney General of the State of Missouri,*

Petitioners,

vs.

DAVID E. WALTON,

Respondent.

**BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

HOWARD B. EISENBERG
Illinois Bar No. 06186405

SIU LEGAL CLINIC
104 Lesar Law Building
Southern Illinois University
Carbondale, Illinois 62901-6821

(618) 536-4423

ATTORNEY FOR RESPONDENT

QUESTIONS PRESENTED

I

Should this Court exercise its certiorari jurisdiction to decide an issue which could only arise in cases which became final before April 30, 1986 and, even then, only in cases in which the prosecutor voluntarily provided his reasons for striking African Americans from a venire by use of peremptory challenges?

II

Under this Court's decision in *Swain v. Alabama*, 380 U.S. 202 (1965), may a court review the reasons volunteered by a prosecutor for using all 14 of his peremptory challenges to remove every black person from the trial jury and determine that a black defendant was denied Equal Protection of Law because the asserted reasons volunteered by the prosecutor were overtly race-based?

III

Should this Court utilize this case as a vehicle for possible expansion of the rule in *Stone v. Powell*, 428 U.S. 465 (1976), limiting the scope of habeas corpus under 28 U.S.C. §2254, when Respondent was afforded no full and fair hearing of the issue in state court and when the issue involved is the overt exclusion of blacks from the jury by the state prosecutor and not a judicially created exclusionary rule?

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
ARGUMENT	4
I. THE FACTS GIVING RISE TO THIS CASE ARE UNIQUE AND COULD NOT POSSIBLY ARISE NOW OR IN THE FUTURE. . .	4
II. THE RESULT IN THIS CASE IS MANDATED BY THE COURT'S DECISION IN *SWAIN*.	5
III. AS THIS CASE DOES NOT INVOLVE A JUDICIALLY CREATED EXCLUSIONARY RULE, THERE IS NO BASIS TO APPLY *STONE v. POWELL* TO THE INSTANT CASE. IN ANY EVENT, SINCE RESPONDENT WAS NOT AFFORDED A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS CLAIM IN STATE COURT, THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR EXPANSION OF *STONE*.	8
A. *Stone* is Limited to Cases Involving Judicially Created Exclusionary Rules.	8
B. In any Event, Respondent was Not Afforded a Full and Fair Opportunity to Present this Issue to the State Courts of Missouri	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases **Page**

Batson v. Kentucky, 476 U.S. 79 (1986) 2, 4, 6, 7

Cardwell v. Taylor, 461 U.S. 571 (1983) 8

Edwards v. Thigpen, 682 F.Supp. 1374 (S.D. Miss. 1988) 4

Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987), *cert. denied*, 484 U.S. 898 (1987) 2, 5

Hamilton v. Jones, 907 F.2d 807 (8th Cir. 1990) 4

Kimmelman v. Morrison, 477 U.S. 365 (1986) 8

Nevius v. Sumner, 852 F.2d 463 (9th Cir. 1988), *cert. denied*, 490 U.S. 1059 (1989) 6

People v. Hope, 137 Ill.2d 430, 560 N.E.2d 849 (1990) 7

Rose v. Mitchell, 443 U.S. 545 (1979) 8, 9

State v. Walton, 703 S.W.2d 540 (Mo.App. 1985) 2, 9

Stone v. Powell, 428 U.S. 465 (1976) 8-10

Swain v. Alabama, 380 U.S. 202 (1965) 2, 3, 5-7

Teague v. Lane, 489 U.S. 288 (1989) 5

Weathersby v. Morris, 708 F.2d 1493 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984) 5, 6

United States Code

28 U.S.C. §2254 . . . . . 2, 4, 5, 8

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STATEMENT OF FACTS

Respondent David E. Walton and co-defendant Sidney Hamilton are African-Americans who were charged in the state courts of Missouri with robbery, armed criminal action, and tampering. Walton was convicted following a jury trial and sentenced to 20 years imprisonment.

At the joint trial of Walton and Hamilton, the state prosecutor used all 14 of his peremptory challenges to remove every

African American from the panel which considered the case[1]. Respondent's motion for a mistrial on this basis was denied as was his motion for a new trial after the verdict was returned. However, in responding to the Respondent's objection, the prosecutor volunteered the reasons for excluding the black veniremen.

The Missouri Court of Appeals affirmed Respondent's conviction, *State v. Walton*, 703 S.W.2d 540 (Mo.App. 1985), finding that he had not sustained his burden under *Swain v. Alabama*, 380 U.S. 202 (1965) of showing systematic exclusion of blacks in "case after case." The Missouri Supreme Court denied review on February 18, 1986. Certiorari was not sought to review the conviction. On April 30, 1986 this Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986) which partially overruled *Swain* and allowed for a showing of discrimination by the prosecution in striking black veniremen in a single case. Respondent moved the Missouri Court of Appeals to recall the mandate in his case, but that motion was denied without opinion in May, 1987.

Respondent then commenced this habeas corpus action under 28 U.S.C. §2254 in the United States District Court for the Eastern District of Missouri raising, on Equal Protection grounds, the exclusion of blacks by use of the prosecution's peremptory challenges. The District Court, following *Swain* and the Eighth Circuit's decision in *Garrett v. Morris*, 815 F.2d 509 (8th Cir.

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[1] One black person served as an alternate juror but was excused before the jury deliberated.

1987), *cert. denied*, 484 U.S. 898 (1987), found that the state prosecutor had eliminated African Americans from the jury on the basis of race and that the asserted reasons he volunteered for such removal were pretextual. The Court thus granted the writ, and the State appealed.

The Court of Appeals affirmed, finding that under *Swain* "once prosecutors voluntarily offer their reasons for exercising their peremptory challenges ... [the court is] compelled to effectuate *Swain's* equal protection holding by determining whether the venirepersons were excluded because of their race," (*Appendix*, A-13). The Eighth Circuit further upheld the District Court's conclusion that the reasons stated by the prosecutor for striking black veniremen were pretextual and "the prosecutor's use of peremptory challenges violated the equal protection clause" (*Id.* A-17).

The Warden filed a timely Petition for Rehearing *En Banc* which was denied by the Court of Appeals without recorded dissent (*Appendix*, A-1). The Missouri Attorney General has now petitioned this Court to review the judgment of the United States Court of Appeals for the Eighth Circuit. That Court has stayed issuance of its mandate pending disposition of this petition.

Petitioner remains incarcerated serving the sentences which have been vacated by the courts below. Additional facts, as required, will be stated in the body of this Brief.

ARGUMENT

I

THE FACTS GIVING RISE TO THIS CASE ARE UNIQUE AND COULD NOT POSSIBLY ARISE NOW OR IN THE FUTURE.

The issue raised by this petition applies only to cases in which the prosecutor volunteered the reasons for utilizing peremptory challenges for removing persons from the venire and which became final prior to this Court's April 30, 1986 decision in *Batson*. The issue raised by this case could not occur in any case which became final after April 30, 1986 or in any case before that date in which the prosecutor failed to give reasons for using peremptory challenges or did so upon order of a court, *see*, *Edwards v. Thigpen*, 682 F.Supp. 1374, 1386 (S.D. Miss. 1988).

It is possible, of course, that there are still some cases winding their way through the system which would fall within the parameters of the Eighth Circuit's decision in this case, but it is most unlikely. In fact, the case involving Sidney Hamilton, Respondent's co-defendant, did not even fall within the purview of the rule involved here because his case became final after *Batson* was decided, even though Hamilton and Respondent were convicted by exactly the same jury, *Hamilton v. Jones*, 907 F.2d 807 (8th Cir. 1990).

In short, this case is *sui generis*. The actual issues presented will have no application to anyone other than Walton. Moreover, the principles of law argued by the Petitioners are adequately dealt with in the many recent decisions of this Court concerning the scope of review under 28 U.S.C. §2254.

Respondent submits that this is not the type of case to warrant discretionary review by this Court.

II

THE RESULT IN THIS CASE IS MANDATED BY THE COURT'S DECISION IN SWAIN.

Petitioners advance a complex argument[2] for why the decision of the lower courts violated the rule established in this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989) which forbade federal courts from applying a "new rule" of law in a 2254 case. The State's position is that the decision of the Eighth Circuit in this case and in *Garrett* established a "new rule" in a habeas corpus case in violation of *Teague*. Resort to the complexities of habeas corpus law is unnecessary and inappropriate in this case because the decisions in this case, *Garrett*, and *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984) were directly dictated by this Court's decision in *Swain v. Alabama*. As the instant case was tried almost 20 years after the decision in *Swain*, no retroactivity question or "new rule" issue is involved in this case.

This explicit point was made by Judge McMillian, writing for the Court of Appeals in this case:

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[2] Indeed, should certiorari be granted in this case Respondent will argue that he is entitled to the application of Batson to his case.

> While *Swain* is most renowned for its now overruled holding that prosecutors are presumed to have exercised their peremptory challenges in a lawful manner, see 380 U.S. at 222-23, the Court also held, and reaffirmed, that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." Id. at 203-04 [citations omitted]... "This principle has been 'consistently and repeatedly' reaffirmed ... in numerous decisions of this Court both preceding and following *Swain*." *Batson*, 476 U.S. at 84 (footnote omitted) (quoting *Swain*, 380 U.S. at 204). Under *Swain*, a defendant can establish a prima facie case of purposeful discrimination by proving that the prosecutor used his or her peremptory challenges "to exclude blacks from the jury 'for reasons unrelated to the outcome of the particular case on trial' or to deny to blacks 'the same right and opportunity to participate in the administration of justice enjoyed by the white population.' " *Batson*, 476 U.S. at 91 (quoting Swain, 380 U.S. at 224). ... once prosecutors voluntarily offer their reasons for exercising their peremptory challenges, the presumption of lawfulness vanishes and we are compelled to effectuate *Swain's* equal protection holding by determining whether the venirepersons were excluded because of their race. *See Garrett*, 815 F.2d at 511-12. In our view, *Garrett* can be read as announcing a new rule only if *Swain's* holding that the exercise of peremptory challenges is presumptively lawful is emphasized over *Swain's* other holding that the exercise of peremptory challenges to exclude venirepersons because of their race violates the equal protection clause.

(*Appendix*, A-13-14).

The Eighth Circuit's reading of *Swain* finds support in Justice White's concurring opinion in *Batson*. Justice White, the author of the *Swain* opinion, pointed out that under *Swain* the trial judge could "invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors...", 476 U.S. at 101, fn. * (White, J., *concurring*).

The Ninth Circuit in *Weathersby* and *Nevius v. Sumner*, 852 F.2d 463, 467 (9th Cir. 1988), *cert. denied*, 490 U.s. 1059 (1989) and

the Illinois Supreme Court in *People v. Hope*, 137 Ill.2d 430, 478, 560 N.E.2d 849, 871 (1990) also read *Swain* to prohibit overtly race based use of peremptory challenges when the reasons for use of the peremptories were volunteered by the prosecution.

Petitioners' parsed reading of *Swain* would mean that prior to *Batson* a prosecutor could have asserted on the record that she used her peremptory challenges to remove African Americans because they were not sufficiently intelligent to serve on juries or because she believed that black persons should not be allowed to participate in the criminal justice system--and there was no constitutional recourse available to an African American defendant. As Justice White noted in *Batson*, nothing in *Swain* supports such an absurd result. "*Swain* specifically disapproved challenges that were overtly race based...despite tolerating, for the sake of honoring the peremptory-challenge system, challenges that had an unspoken racial basis, " *People v. Hope*, *id.*

The result in this case, in which the prosecutor used *every one* of his peremptory challenges to remove *every* black person from the trial jury and then asserted pretextual reasons for striking the jurors is precisely the type of specific and overtly race-based exclusion that is forbidden by *Swain*. The Court of Appeals did nothing more than apply *Swain* to a new set of facts. That result was correct. No "new rule" of law is involved in this case.

The issues pressed by Petitioners are simply not presented by this case. There is no occasion to grant the requested writ to decide such questions.

III

AS THIS CASE DOES NOT INVOLVE A JUDICIALLY CREATED EXCLUSIONARY RULE, THERE IS NO BASIS TO APPLY STONE v. POWELL TO THE INSTANT CASE. IN ANY EVENT, SINCE RESPONDENT WAS NOT AFFORDED A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS CLAIM IN STATE COURT, THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR EXPANSION OF STONE.

As has become typical in habeas corpus cases filed by state prisoners under 28 U.S.C. §2254, the Attorney General asks this Court to expand *Stone v. Powell*, 428 U.S. 465 (1976) to prohibit state prisoners from raising jury selection issues in a 2254 case. There is no basis to consider such claim in the instant case.

A. Stone is Limited to Cases Involving Judicially Created Exclusionary Rules.

This Court has repeatedly limited the scope of *Stone* to judicially created exclusionary rules. The Court said so explicitly in *Stone* itself, 428 U.S. at 469, and reiterated the limitation in a case involving discriminatory selection of a grand jury foreman (*Stone* is "carefully limited...to cases involving the judicially created exclusionary rule"), *Rose v. Mitchell*, 443 U.S. 545, 560 (1979) (*plurality decision*). Subsequently, the Court has refused to extend the *Stone* rationale to statements alleged to be involuntary, *Cardwell v. Taylor*, 461 U.S. 571, 573 (1983) and to ineffective representation of counsel for failure to file a timely motion to suppress, *Kimmelman v. Morrison*, 477 U.S. 365 (1986). In *Kimmelman* the Court made clear that unlike the judicially created exclusionary rules: "The constitutional rights of criminal defendants are granted to the innocent and the guilty alike...the scope of [the constitutional] right is [not] altered...simply because the right is asserted on federal habeas review rather than

on direct review," 477 U.S. at 380.

The exclusion of blacks from a jury is certainly not a judicially created exclusionary rule. In *Rose* this Court made clear that *Stone* would not bar claims that impugn "the fairness, and thus the legitimacy of our adversary process," 443 U.S. at 563. It would be a drastic departure from this Court's previous decisions suddenly to extend *Stone* in the manner suggested by Petitioners. There is no basis to do so.

B. In any Event, Respondent was Not Afforded a Full and Fair Opportunity to Present this issue to the State Courts of Missouri.

The basis for *Stone* was that once a state prisoner has been afforded a full and fair opportunity to present his Fourth Amendment claim in state court, he is barred from raising the question in federal court. Here, however, the Respondent was denied an opportunity to a full and fair hearing on the issue in state court. The state trial judge said that under Missouri law the prosecutor could exercise his peremptory challenges any way he desired and not be subject to judicial inquiry (*Appendix*, A-69). No actual determinations was made by the trial court other than "of [the prosecutor's] 14 strikes, all 14 were black," *id.*

Similarly, the Missouri Court of Appeals made no factual determination regarding the validity of the reasons given by the prosecutor for striking every African American from the venire. All the appellate court said on the issue is that Walton failed to show exclusion of black persons from juries "in case after case," *State v. Walton*, 703 S.W.2d at 541. No factual determination was

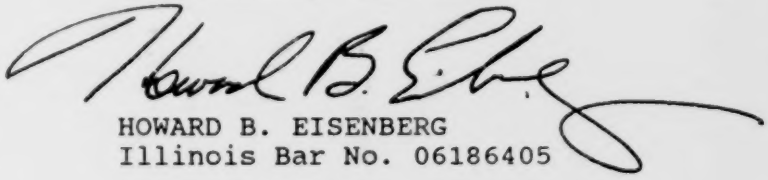
made on this point by either Missouri court considering this case.

Thus, while Respondent disagrees completely with Petitioners' general effort to expand *Stone*, this is simply an inappropriate case to make such argument. Here the factual issue was not determined in the state courts because the Missouri court refused to consider the reasons volunteered by the prosecutor for removing all of the black people from the jury. Thus even if *Stone* were extended to jury selection issues, it would not be a bar here because there was no "full and fair" opportunity to consider such issues in the state court.

CONCLUSION

For the reasons stated, David E. Walton asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,



HOWARD B. EISENBERG
Illinois Bar No. 06186405

SIU LEGAL CLINIC
104 Lesar Law Building
Southern Illinois University
Carbondale, Illinois 62901-6821

(618) 536-4423

ATTORNEY FOR RESPONDENT

HBE
2/15/91